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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 820

MADELINE V. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 2–3) is reported at 239 F. 2d 168.

JURISDICTION

The judgment of the Court of Appeals was entered on December 12, 1956, and a petition for rehearing was denied on February 6, 1957. (Pet 3.) The petition for a writ of certiorari was filed on March 6, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1). (Pet. 3.)

QUESTIONS PRESENTED

1. Whether the trial court erred in admitting into evidence charts summarizing the Government's alle-

gations of the petitioner's unreported income and tax, and testimony in explanation of their preparation.

2. Whether the prosecutor committed reversible error in his remarks in summation to the jury.

3. Whether the trial court erred in imposing a sentence on the petitioner under Section 145 (b), Internal Revenue Code of 1939, in excess of that which could have been imposed under Section 3616 (a) of the Code.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b).)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False Returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent

> to defeat or evade the valuation, enumeration, or assessment intended to be made; * * *
>
> * * * * * *
>
> he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.
>
> (26 U. S. C. 1952 ed., Sec. 3616 (a).)

STATEMENT

On October 5, 1955, a two-count indictment was filed against the petitioner in the United States District Court for the Western District of Tennessee charging that she willfully attempted to evade and defeat a large portion of her income taxes for the years 1949 and 1950 by filing fraudulent returns in violation of Section 145 (b) of the Internal Revenue Code of 1939. The indictment charged that the amounts of net income and the tax liability as reported in the return and as corrected were as follows (R. 4a–5a):[1]

	Reported		Corrected	
	Net Income[1]	Tax	Net Income	Tax
Count I (1949)	$8,119.23	$1,419.48	$24,054.34	$7,797.97
Count II (1950)	9,445.74	1,725.49	25,910.35	9,387.13

[1] Petitioner reported as gross income the sum of $1,252.30 for the year 1949, and the sum of $14,950.50 for the year 1950. (R. 67a–68a.)

On February 13, 1956, after a jury trial, the petitioner was found guilty as charged and sentenced to three years imprisonment and fined $10,000 and costs.

[1] The record consists of three printed volumes comprising the appendices to the briefs in the Court of Appeals. The appellant's appendix, numbered 1a through 316a, and the Government's appendix, numbered 1b through 107b, are designated herein as "R". The appellant's supplemental appendix, numbered 1a through 38a, is designated "Supp. R."

(R. 34a.) Subsequent motions to arrest judgment and for a new trial were denied. (R. 46a–47a.) The Court of Appeals affirmed the conviction, and denied a rehearing. (Pet. 2–3.)

The petitioner is a lawyer whose practice was confined almost exclusively to divorce matters. The bulk of the Government's evidence showed receipt of specific items of unreported income. Approximately 140 witnesses testified that they had paid the petitioner legal fees during the two years involved. (R. 6b–72b, 5b; 120a.) Their testimony indicated that approximately $20,000 had been received, of which only $1,930.50 was recorded in her books and reported. (R. 201a.) Receipt in 1949 of $1,992.50 in fees which were not reported was evidenced by her records. (R. 174a–175a.) Records of courts in which petitioner had practiced showed total refunds to her in the years 1949 and 1950 of $1,365.85 in docket fees, etc., which petitioner did not return to clients or report on her returns. (R. 175a, 200a.)

The Government also introduced evidence of bank deposits and expenditures indicating that petitioner's net income was approximately $27,000 in 1949, and $24,000 in 1950. Net worth proof submitted in corroboration indicated that petitioner had a net income of $24,000 in 1949, and $25,000 in 1950. (R. 192a–193a).

ARGUMENT

1. Petitioner contends that six charts prepared in advance of trial by the investigating agent, Hubert Norris, summarizing her reported and alleged income and tax were not supported by the evidence, and that the trial court therefore erred in permitting them to be

introduced.[2] (Pet. 15.) She also objects, for the same reason, to Mr. Norris' testimony explaining the method he used in computing certain figures on the charts. (Pet. 21.)

Petitioner states that in computing the corrected net income shown on the chart, Mr. Norris included legal fees she received from 339 divorce cases, whereas the Government produced only 174 witnesses, and concludes therefore that he (Pet. 15)—

> took into consideration the statements of a hundred and sixty-five witnesses, or former clients, with whom he had apparently conferred, but who were not present in the courtroom * * *.

This conclusion is not supported by the record. It ignores the voluminous documentary evidence (R. 76a, 80a, 83a, 85a–87a, 89a, 97a, 101a, 105a–107a, 192a, 204a, 209a), and the testimony of witnesses whose testimony was not confined to the payment of fees in a single case (R. 72a–76a, 79a–91a, 96a–114a), which, together with the testimony of the receipt of income limited to a single case, substantially supported the charts. (R. 165a.) Contrary to petitioner's contention (Pet. 15), the charts were computations based on substantially the entire record as to petitioner's income.

The unreported income figures shown on the charts were computed on the basis of receipts shown in the petitioner's own books, refunds evidenced by court records, and legal fees understated or omitted from her books. (R. 158a, 174a–175a, 177a.) Inclusion of

[2] The petitioner states that these charts were prepared more than two years before the trial. (Pet. 3.) Nothing in the record supports this statement. Mr. Norris testified that he prepared them about a week before the trial began. (R. 216a.)

the latter receipts was based substantially on the testimony of the numerous witnesses evidencing specific payments. However, court records showing the cases in which petitioner had appeared as counsel, and her bank deposits, indicated that she received fees in excess of those that could be shown by specific item proof. Accordingly, to reflect this income Mr. Norris projected the fee income evidenced by specific item proof by finding the average of these fees and multiplying it by the number of cases not represented by specific item evidence in which the court records indicated petitioner had appeared. This was done for both years involved. (R. 187a–192a.) The projected income was not, as the petitioner alleges, purely a clusion of Mr. Norris (Pet. 21), but an attempt to make intelligible to the jurors the relationship between unexplained bank deposits and the large number of cases in which the petitioner had appeared as counsel from which she had reported no income.

The petition, recognizing this Court's decision in *United States* v. *Johnson*, 319 U. S. 503, apparently concedes the admissibility of summarizing charts and testimony based on substantially the entire record,[3]

[3] It is well settled that the Government may summarize by charts and testimony where the record presents a complicated set of facts. *United States* v. *Kelly*, 105 F. 2d 912, 918 (C. A. 2d); *United States* v. *Schenck*, 126 F. 2d 702, 708–709 (C. A. 2d), certiorari denied *sub nom. Moskowitz* v. *United States*, 316 U. S. 705; *United States* v. *Augustine*, 189 F. 2d 587, 589 (C. A. 3d); *Bell* v. *United States*, 185 F. 2d 302, 306–308 (C. A. 4th), certiorari denied, 340 U. S. 930; *Lloyd* v. *United States*, 226 F. 2d 9, 16–17 (C. A. 5th); *Hanson* v. *United States*, 186 F. 2d 61, 67 (C. A. 8th); *Kampmeyer* v. *United States*, 227 F. 2d 313, 317 (C. A. 8th), motion for leave to file petition for certiorari denied, 351 U. S. 904; *Bateman* v. *United States*, 212 F. 2d 61, 68 (C. A. 9th); *Gendelman* v. *United States*, 191 F. 2d 993, 996–997 (C. A. 9th), certiorari denied, 342 U. S. 909; *Graves* v. *United States*, 191 F. 2d 579, 584 (C. A. 10th).

but contends that Mr. Norris went beyond this in his computations and invaded the province of the jury to pass on the credibility of the evidence. (Pet. 16, 21.)

As this Court pointed out in *United States* v. *Johnson, supra* (p. 519), no issue is withdrawn from the jury when the trial judge's instruction to the jurors makes it clear that the correctness and credibility of the evidence underlying the computations is for them to determine. Such instructions were repeatedly given here. (R. 161a–162a, 166a, 169a, 173a, 178a, 185a, 190a.)

In *United States* v. *Ward,* 169 F. 2d 460 (C. A. 3d), relied upon by the petitioner (Pet. 16), the Court of Appeal reversed because the Government's witness in giving computations admittedly disregarded the testimony of witnesses he believed unreliable, thereby passing on their credibility (pp. 462–463). Here, Mr. Norris carefully noted the testimony of each witness to insure that his computations conformed substantially with the proof. (R. 165a.) The case of *Steele* v. *United States,* 222 F. 2d 628 (C. A. 5th), cited by the petitioner (Pet. 17), is also distinguishable on its facts. The reversal there rested principally upon the court's conclusion that the peculiar circumstances under which two charts were sent to the jury room after deliberations had begun invested them with a special "air of credibility" in the jurors' eyes (p. 630, *supra*).

2. Petitioner alleges that the United States Attorney by stating to the jurors in summation (R. 304a): "Are you worrying about innocent people being pun-

ished with * * * Judge Boyd presiding over this Court," induced them to surrender their responsibility to the court. (Pet. 19.) The record does not sustain this contention. The prosecutor repeatedly impressed upon the jurors that they had the sole responsibility of weighing the evidence and determining the petitioner's guilt. (R. 256a, 258a, 263a, 269a.) Immediately preceding the remark complained of, the prosecutor told the jurors that they were to be guided only by the evidence and the court's instruction. (R. 304a.) Moreover, the petitioner's counsel in his closing argument had inferred that only Mr. Norris was of the opinion that there was sufficient evidence to warrant the prosecution. (R. 273a, 282a–283a, 287a, 290a–291a.) The prosecutor's remark properly sought to refute this inference.

3. Petitioner raises the question of the legality of her sentence and the validity of the indictment under Section 145 (b) of the Internal Revenue Code of 1939, alleging that the facts here could only constitute an offense under Section 3616 (a) of the 1939 Code. (Pet. 21.) This issue was not raised in the courts below. In *United States* v. *Doyle,* 234 F. 2d 788 (C. A. 7th), certiorari denied, 352 U. S. 893, and *Moran* v. *United States,* 236 F. 2d 361 (C. A. 2d), certiorari denied, 352 U. S. 909, where the identical question was also not properly raised in the trial court, this Court denied certiorari. In *Costello* v. *United States,* 221 F. 2d 668 (C. A. 2d), now pending on certiorari, this Term, No. 666, the issue was properly raised by motions under 28 U. S. C. 2255 and Rule 35 of the Federal Rules of Criminal Procedure; and in *United States* v.

Achilli, 234 F. 2d 797 (C. A. 7th), now pending on certiorari, this Term, Nos. 430 and 834, the petitioner contended that a motion in the trial court raised the issue and later moved for a correction of sentence under 28 U. S. C. 2255.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied. However, since the petition raises the question also involved in the *Achilli* and *Costello* cases (Nos. 430, 666, and 834), this Court may wish to defer disposition of the instant petition until those cases are decided.

Respectfully submitted,

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